

**PUBLIC UTILITIES COMMISSION**

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298



January 12, 2004

**Agenda ID #3184**

TO: PARTIES OF RECORD IN APPLICATION 03-06-014

Enclosed is the draft decision of Administrative Law Judge Thomas. The decision will not appear on the Commission's agenda for at least 30 days after the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at <http://www.cpuc.ca.gov>. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ Angela K. Minkin  
Angela K. Minkin, Chief  
Administrative Law Judge

ANG: avs

Decision **DRAFT DECISION OF ALJ THOMAS** (Mailed 1/12/2004)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Application of SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) for Authority to Lease Available Land on the Barre-Villa Park Transmission Right of Way to RHC Communities, LLC.

Application 03-06-014  
(Filed June 13, 2003)

**DECISION GRANTING APPLICATION WITH CONDITIONS**

**I. Summary**

Pursuant to Public Utilities Code Section 851, this decision grants the application of Southern California Edison Company (SCE) to lease land to RHC Communities, LLC (RHC) for construction of self-storage facilities. We will require SCE to modify the terms of the lease in order to protect its utility customers. If these changes are made, we find that the lease will not impair SCE's ability to serve its customers, and will not harm the environment. As SCE proposes, the gross lease proceeds shall be allocated to SCE's shareholders and ratepayers, respectively, according to a 70 percent – 30 percent split.

**II. Background**

SCE proposes to lease to RHC a 10.15-acre site located on a portion of SCE's Barre-Ville transmission right of way (ROW) in an unincorporated area of Orange County (Site). On September 6, 2001, RHC and SCE executed an Option Agreement (Agreement) allowing RHC to operate a self-storage facility on the Site if the Commission authorized a lease. SCE now seeks such authorization.

SCE contends RHC's operation of a self-storage facility is compatible with SCE's utility operations because the Site is not currently used for any purpose other than as a ROW for transmission lines. Under the proposed 65-year lease with RHC, the Site will generate base rent of \$23,000 in Year 1; \$80,000 in Year 2; \$170,000 in Year 3; and \$262, 000 in Year 4 of the lease term. After Year 4, base rent will increase annually by the percentage increase, if any, in the consumer price index, subject to a maximum annual increase of 3 percent. At the end of each calendar year, starting in Year 1 of the lease term, RHC will pay as additional rent the amount by which 20% of its annual gross rent exceeds the base rent paid during that year.

SCE used a self-storage consulting and management firm to prepare a market analysis of self-storage rental rates to establish the lease prices it negotiated with RHC. The annual base rent SCE will receive from RHC falls within the expected market range established by the consultants.

The Agreement provides that RHC's activities must not interfere with the operation of the electric facilities that cross the Site. RHC is not allowed to use or store hazardous substances, explosives or flammable materials on the Site. RHC's facilities must be located at specified distances from SCE's overhead electric conductors, towers, poles and anchors. RHC must provide and maintain access roads on the Site, and SCE retains the right to enter the Site at any reasonable time to inspect the property. SCE may also impose temporary restrictions on RHC's right to enter or use the Site in order for SCE to perform necessary work on the electrical facilities on the Site.

The Agreement also contains terms requiring RHC to obtain permits for construction on the Site; to carry insurance and indemnify SCE against liability

for damages or injury to persons on the Site except to the extent caused by SCE's active negligence or willful misconduct; and to pay its own property taxes.

SCE believes that self-storage facilities provide the greatest revenue to SCE's shareholders and ratepayers and represent the highest and best use of its transmission ROW property consistent with the utility's obligation to maintain the safety and reliability of its facilities. While not at issue in this application, RHC has an option to develop 24 separate SCE locations as self-storage facilities. The selection of RHC was the result of a competitive bidding process.

The application is unopposed.

### **III. Discussion**

#### **A. Section 851 Analysis**

The basic task of the Commission in a Section 851 proceeding is to determine whether the transaction serves the public interest: "The public interest is served when utility property is used for other productive purposes without interfering with the utility's operation or affecting service to utility customers."<sup>1</sup>

We have reviewed the proposed lease Agreement and find that, with appropriate changes discussed below, it will not impair SCE's ability to provide safe and reliable utility service to the public. The Agreement provides that the RHC self-storage facilities will not interfere with SCE's operation of its transmission lines, will be located a safe distance from those facilities, and will help prevent the introduction of hazards to the Site. SCE will retain the right to inspect and operate its lines, will not bear additional expense as a result of RHC's presence, and is receiving an adequate price for the lease. RHC will be required

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<sup>1</sup> Decision (D.) 02-01-058.

to carry adequate insurance, and will indemnify SCE against liability for damages or injury. Each of these provisions helps satisfy our conclusion that, if modified, the Agreement will be in the public interest pursuant to Section 851.

However, we believe three modifications to the Agreement are essential to SCE's ability to continue to provide safe and reliable utility service and to meet SCE's obligations under Section 851.

First, the Agreement allows RHC to assign or sublet the property to third parties. Because use of utility property by unknown third parties could impair SCE's utility service, we will require that these provisions (contained in Article X of the Agreement) be stricken or modified to provide that this Commission must approve any such assignment or sublease on SCE's application.

First, the lease shall also be modified to give SCE the right to terminate the Agreement should the RHC facilities interfere with SCE's utility functions, or should this Commission order the lease terminated. The current termination provisions, contained in sections 9.3 and 14.3 of the Agreement, do not appear to provide such relief. We must ensure that SCE's ability to serve its utility customers is not impaired by the lease.

Second, the 65-year lease term appears overly long. It may be essential to the deal's financing, but the record does not provide such information. We believe SCE should retain the flexibility to end the lease transaction within a shorter time frame if it becomes necessary for the safe and reliable operation of SCE's facilities. The term should be limited to 25 years.

Third, we are concerned that the sections of the Agreement related to "Explosives and Flammable Materials" and "Hazardous Substances" (sections 5.9 and 5.10 of the Agreement) are not strong enough. Presence of such

materials near SCE's utility facilities could present a hazard. Because RHC intends to use the property as a self-storage facility, RHC's customers, and not just RHC itself, will be storing goods on the Site. The Agreement should require RHC to inspect the stored goods its customers bring to the site to ensure that no explosives, flammable materials or hazardous substances are stored in individual storage spaces. RHC's contracts with its customers should include a provision allowing such inspection. The Agreement should also obligate RHC to set forth the rules against such materials in its contracts with its storage customers,<sup>2</sup> and provide signage and other prominent disclosures of the prohibition on storage of such materials.

Without these modifications, we cannot approve the application. Therefore, SCE shall submit proposed language to the Energy Division within 30 days of this decision's mailing. If the language is not in keeping with the spirit and letter of this decision, the Energy Division may require changes. Once the Energy Division approves the language, SCE may execute the Agreement with RHC and allow RHC to proceed with its plans.

If SCE and RHC cannot agree upon language meeting the spirit and letter of this decision, the conditions of this decision will not be met. In that case, SCE may not lease the space at issue to RHC.

## **B. Environmental Review**

The California Environmental Quality Act (CEQA)<sup>3</sup> applies to discretionary projects to be carried out or approved by public agencies. A basic

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<sup>2</sup> RHC may use the same language in its contract with its customers as SCE used in the Agreement.

<sup>3</sup> Public Resources Code Sections 21000, *et seq.*

purpose of CEQA is to “inform governmental decision-makers and the public about the potential significant environmental effects of the proposed activities.”<sup>4</sup>

Because the Commission must issue a discretionary decision (*i.e.*, grant Section 851 authority) without which the proposed activity cannot proceed, and because the activity has the potential to result in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment,<sup>5</sup> the application is subject to CEQA and the Commission must act as either a Lead or Responsible Agency under CEQA.

The Lead Agency is the public agency with the greatest responsibility for supervising or approving the project as a whole.<sup>6</sup> A Responsible Agency is required to consider the environmental consequences of a project that is subject to its discretionary approval, and in particular to consider the Lead Agency’s environmental documents and findings before acting upon or approving a project.<sup>7</sup>

Here, the County of Orange (County) is the Lead Agency for the project under CEQA. The Commission is a Responsible Agency for this proposed project under CEQA. CEQA requires that the Commission consider the environmental consequences of a project that is subject to its discretionary approval. In particular, the Commission must consider the Lead Agency’s environmental documents and findings before acting upon or approving the

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<sup>4</sup> Title 14 of the California Code of Regulations, hereinafter CEQA Guidelines, Section 15002.

<sup>5</sup> CEQA Guideline § 15378.

<sup>6</sup> *Id.*, § 15051(b).

<sup>7</sup> *Id.*, § 15050(b).

project.<sup>8</sup> The specific activities a Responsible Agency must conduct are contained in CEQA Guidelines Section 15096.

The proposed project reviewed by the County consists of the construction of 33 one-story buildings and an office structure on 10.15 acres of land on the Barre-Villa Park transmission line ROW. The County exercised discretionary authority over this project by virtue of a General Plan amendment, a zone change from R1 (single family residential) to C1 (Local Business), and a Development Plan for the property.

On October 9, 2002, the County circulated a Draft Mitigated Negative Declaration (DMND) through the County Clerk of Orange County for public review. The County then issued a proposed Final Mitigated Negative Declaration (FMND) for public review October 28, 2002. Although the FMND found that residual environmental impacts were anticipated in the areas of (a) Land use and Planning, (b) Hydrology and Drainage, (c) Water Quality, (d) Noise, (e) Aesthetics, (f) Hazards, and (g) Public Services, the FMND incorporated mitigation measures designed to reduce these potential environmental impacts to a less than significant level.

On December 17, 2002, the Board of Supervisors of Orange County received the proposed FMND, the Planning Commission's recommendation to disapprove the amendment and zone change, and the comments, statements, and other evidence presented by all persons, including members of the public who may have appeared and addressed the County. Subsequently, the County took discretionary action and approved the General Plan Amendment and Zone

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<sup>8</sup> *Id.*



change. The County deferred action on the FMND and the Development Plan until September 30, 2003 when, under Ordinance No. 03-014 and Resolution No. 03-325, the County approved the Development Agreement, certified the FMND, adopted the Findings of Fact and approved the project. A Notice of Determination was filed with Clerk-Recorder of Orange County on October 1, 2003, in compliance with Sections 21108 and 21152 of the Public Resources Code.

We have reviewed the County's environmental documents and find them adequate for our decision-making purposes. We also find that the County reasonably concluded that the project, as approved with required mitigation measures, would not have a significant negative effect on the environment. Accordingly, we adopt the County's environmental documents and conclusions for purposes of our approval.

We remind SCE that where the Commission is a Lead or Responsible Agency under CEQA, SCE should include all relevant environmental documents with its application. The Commission cannot act in its capacity as a Responsible Agency until the record is complete. In this case, while SCE provided some of the material with its application, it did not provide a full record of the proceedings before the County of Orange, requiring our Energy Division to request supplementation of the record. SCE's failure to furnish the full record delayed our processing of this application.

**C. Allocation of Lease Proceeds Between Shareholders and Ratepayers**

SCE contends that Commission precedent dictates that the lease proceeds be allocated 70-30 between shareholders and ratepayers, respectively. We agree that this is the appropriate allocation, and clarify that this split applies to gross, rather than net, lease proceeds. Gross proceeds are the total lease

revenues SCE will receive for allowing use of its land, without reduction for lease expenses such as those related to maintenance or security, or to loading for overhead costs. This distinction matters to the shareholder-ratepayer allocation because net proceeds can be very low, even negative, depending on the costs SCE allocates to the lease. For ease of calculation, the Commission has mandated a 70-30 split of gross lease proceeds to avoid arguments about which costs should be assigned to the lease.

Precedent supports the 70-30 shareholder-ratepayer split. SCE explains that on January 30, 1998, in accordance with the Commission's Affiliate Transaction rules appended to Decision (D.) 97-12-088, it filed Advice Letter 1286-E, which set forth proposed categories of non-tariffed products and services offered for sale by SCE. The list of non-tariffed products and services included secondary use of transmission rights of way and land as well as secondary use of distribution rights of way, land, facilities and substations, the type of use at issue here.

According to D.99-09-070, gross revenues from non-tariffed products and services are shared between shareholders and ratepayers in two possible ways. Revenues from "active" non-tariffed products and services in excess of an annual threshold are split between shareholders and ratepayers 90-10 percent, respectively. Revenues from "passive" non-tariffed products and services are split 70-30 shareholders-ratepayers. SCE explains that the investment here is "passive" in nature, an interpretation that favors ratepayers. We are aware of no precedent to the contrary, and therefore adopt SCE's recommended allocation. Therefore, SCE shall allocate 70 percent of the gross lease proceeds to its shareholders and 30 percent of the proceeds to its ratepayers.

**IV. Comments on Draft Decision**

The Draft Decision of Administrative Law Judge Sarah R. Thomas in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Pub. Util. Code and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on \_\_\_\_\_, and reply comments were filed on \_\_\_\_\_.

**V. Assignment of Proceeding**

Susan P. Kennedy is the Assigned Commissioner and Sarah R. Thomas is the assigned Administrative Law Judge in this proceeding.

**Findings of Fact**

1. The Site is not currently used for any purpose other than as a ROW for transmission lines.
2. SCE used a self-storage consulting and management firm to prepare a market analysis of self-storage rental rates to establish the lease prices it negotiated with RHC.
3. The annual base rent SCE will receive from RHC falls within the expected market range establish by its consultants.
4. The selection of RHC was the result of a competitive bidding process.
5. The Agreement provides that the RHC self-storage facilities will not interfere with SCE's operation of its transmission lines.
6. The Agreement provides that the RHC self-storage facilities will be located a safe distance from SCE's facilities.
7. The Agreement's provisions regarding hazardous substances, explosives or flammable materials on the Site require modification.
8. Presence of hazardous substances, explosives or flammable materials near SCE's utility facilities could present a hazard.

9. RHC will use the Site to construct a self-storage facility serving third party customers.

10. RHC's customers, and not just RHC itself, will be storing goods on the Site.

11. SCE will retain the right to inspect and operate its lines under the Agreement.

12. The Agreement will not cause SCE to bear additional expense as a result of RHC's presence.

13. The Agreement requires RHC to carry adequate insurance.

14. Under the Agreement, RHC must indemnify SCE again liability for damages or injury.

15. The Agreement allows RHC to assign or sublet its lease rights.

16. The lease has a 65-year term.

17. Orange County is the Lead Agency for the proposed project under CEQA.

18. On September 30, 2003, the County certified the FMND, adopted the Findings of Fact, and gave final approval to the project, finding that the project would not have an adverse effect on the environment.

19. The Commission is a Responsible Agency for the proposed project under CEQA.

20. Consistent with the County's findings and determinations, the proposed project will have a less than significant effect on the environment.

21. The investment here is "passive" in nature.

### **Conclusions of Law**

1. With appropriate changes, the Agreement will not impair SCE's ability to provide safe and reliable utility service to the public pursuant to Section 851.

2. The Commission must ensure that SCE's ability to serve its utility customers safely and reliably is not impaired by the lease Agreement.
3. The Agreement's provisions allowing RHC to assign or sublet the property to third parties should be stricken or modified to provide that this Commission must approve any such assignment or sublease on SCE's application.
4. The 65-year lease term is not in the ratepayers' interest. SCE should retain the flexibility to end the lease transaction within a shorter time frame if it becomes necessary for the safe and reliable operation of SCE's facilities.
5. The lease should be amended to no longer than a 25-year term.
6. The Agreement should be amended to require RHC to contract with its customers to inspect the goods stored in its self-storage facility; to require RHC, in its contract with its customers, to ensure that no explosives, flammable materials or hazardous substances are stored in individual storage spaces; and to require RHC to reinforce the rules against such materials in its contracts with its storage customers, through signage and other, prominent disclosures.
7. Unless SCE and RHC agree to modifications of the Agreement that comport with the spirit and letter of this decision, we should not approve the application.
8. We have reviewed the County's environmental documents and find they are adequate for the Commission's decision-making purposes as a Responsible Agency under CEQA.
9. We adopt the County's environmental findings and conclusions for purposes of our approval.
10. Revenues from "passive" non-tariffed products and services should be split 70-30 shareholders-ratepayers.

11. The gross lease proceeds should be allocated to SCE's shareholders and ratepayers, respectively, according to a 70 percent – 30 percent split.

## O R D E R

### **IT IS ORDERED** that:

1. The application should be approved subject to conditions.
2. If Southern California Edison Company (SCE) and RHC Communities, LLC (RHC) cannot amend their Option Agreement (Agreement) to meet the spirit and letter of the conditions in this decision, set forth below, the application shall be denied.
3. The Agreement's provisions allowing RHC to assign or sublet the property to third parties shall be stricken or modified to provide that this Commission must approve any such assignment or sublease on SCE's application.
4. The Agreement shall be amended to no longer than a 25-year term.
5. The Agreement shall be amended to require RHC to contract with its customers to inspect the goods stored in its self-storage facility; to require RHC, in its contract with its customers, to ensure that no explosives, flammable materials or hazardous substances are stored in individual storage spaces; and to require RHC to reinforce the rules against such materials in its contracts with its storage customers, through signage and other, prominent disclosures.
6. SCE shall submit proposed language meeting the conditions set forth herein to the Energy Division within 30 days of this decision's mailing. If the language is not in keeping with the spirit and letter of this decision, the Energy Division may require changes. Once the Energy Division approves the language, SCE may execute the Agreement with RHC and allow RHC to proceed with its plans.

7. The gross lease proceeds shall be allocated to SCE's shareholders and ratepayers, respectively, according to a 70 percent – 30 percent split.

8. Application 03-06-014 is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.